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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 525

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner*,

v.

MRS. GEORGE NOTHNAGLE, ET AL.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

I

QUESTION INVOLVED

The question in this case is whether the plaintiffs below shall recover damages of $25 in accordance with the Railroad's offer of judgment or $615 which the trial court found to be the value of baggage and contents belonging to the plaintiffs, negligently lost by the defendant, and for which latter amount judgment was entered in favor of the plaintiffs.

II

STATEMENT OF THE CASE

On October 5, 1949, Mrs. George Nothnagle purchased a railroad ticket from Meriden, Connecticut, to Fall River, Massachusetts, via New Haven, Connecticut. At Meriden, Connecticut, at 11:19 a.m. on October 5, 1949, she boarded a train operated by the Railroad and rode as far as New Haven, arriving shortly after 11:30 a.m. At the New Haven railroad station, she was approached by a Red Cap, an employee of the Railroad, who solicited her baggage. She surrendered her baggage to the Red Cap with orders to have the baggage returned to her at the train due to leave for Fall River, Massachusetts, at 12:40 p.m. There is no finding that Mrs. Nothnagle boarded a train for Fall River or as to what she did when the Red Cap failed to return her baggage to her. At any rate, the Red Cap did not return her baggage to her at that time or any other time. The Red Cap gave Mrs. Nothnagle no ticket, no claim check, nor any other item with printing or statement of limitation of liability on it. There was no evidence that Mrs. Nothnagle either paid or intended to pay anything of value for the handling of her baggage. There were no signs posted calling to the attention of Mrs. Nothnagle that the defendant had attempted to limit its liability in any way. The plaintiff had no knowledge of a tariff limiting or purporting to limit liability for the handling of her baggage by the Red Cap. The trial court found that the baggage was lost through the negligence of the Railroad.

Suit was commenced against the Railroad. The Railroad claimed that its liability was limited to $25 on the ground that it had on file with the Interstate Commerce Commission a tariff entitled "New England Joint Tariff R. C. No. 3-N." The trial court overruled the Railroad's defense and concluded that the plaintiff's baggage was left with the defendant for safekeeping and not for transportation, that the baggage was not in interstate commerce, that the Railroad was a bailee, that the Connecticut law concerning bail-

ments determined the rights and liabilities of the parties and that judgment should enter for the plaintiffs to recover $615 damages plus costs.

III

ARGUMENT

A

The Railroad, in its Argument in its Petition for Certiorari, p. 9, said "She actually continued on her journey to Fall River because the Red Cap did not return her baggage to her 'at that time', i.e., at 12:40 P.M." There is no evidence whatever in this record, either in the Finding of the lower court or otherwise, that the plaintiff below "actually continued on her journey to Fall River"—either "because the Red Cap did not return her baggage"—or for any other reason. There is no evidence that the plaintiff continued her journey to Fall River at any time. There is no evidence that if she did continue her journey to Fall River that she did so "because the Red Cap did not return her baggage to her 'at that time.'" On the contrary, if we are to go outside the record and indulge in speculation, it is far more logical to speculate that she did *not* go to Fall River because her baggage had been lost; rather, that she went to the railroad station and called up her husband in Meriden to tell him of her loss, that he advised her to report her loss to the stationmaster at New Haven; that she could not continue her journey to Fall River because she had no baggage and no belongings to serve her needs if she had gone to Fall River.

These observations have no more place in this argument than the Railroad's contention simply for the reason that there is no evidence whatever on this subject. Mention is here made of these points, however, because of the tone created by the claim of the Railroad and the setting in which it would cast the circumstances out of which the loss arose.

B

The Railroad in its Argument in its brief to this Honorable Court, p. 6, said "At that time it is obvious she intended to continue her journey. Also, before she gave the bag to the Red Cap, she must have inquired when, and from where, the Fall River train would leave because she told him to return the bag to her at the train leaving for Fall River on Track #8 at 12:40 P.M." Once again, *arguendo*, the Railroad asserts conclusions and attempts to justify them, when it might with more justification have stated that the plaintiff learned the Fall River train would leave on Track #8 either because the public address system informed all passengers of the fact, or because the conductor told her as a matter of courtesy when he punched her ticket en route to New Haven from Meriden, to change trains at New Haven and to board the Fall River train there on Track #8, at 12:40 P.M.

Again, at p. 7 of its brief here, the Railroad says "At all times, she had the intent to go on an interstate trip." It is equally inferable that whatever her original intent, that intent was abandoned when her baggage was lost.

It is perfectly obvious that in going outside of the record or in substituting its own conclusions, the Railroad is seeking to substitute its judgment for that of the Supreme Court of Errors of the State of Connecticut which was bound by the facts as found by the trial court. The Connecticut Supreme Court of Errors, in its opinion, R. pp. 16-17, said: ". . . *The finding* describes the proposed journey from Meriden to Fall River as not being continuous. It was suspended for a substantial time in New Haven. It was to be resumed only when the plaintiff started to board the train which would take her from New Haven to Fall River. Her journey, *so for as it appears from the facts before us*, was intrastate." (Emphasis supplied)

Continuing the Court said, R. p. 17 ". . . In this very important aspect, the case at bar is distinguishable from

these cases, relied upon by the defendant (citing cases)."

Further, on the same p. 17, the Court said:

> "The trial court's conclusion that the plaintiff left her bag with the defendant's agent for safekeeping and not for transportation was a conclusion drawn from subordinate facts. . . . It is reasonably and logically supported by them and is not in violation of any rule or principle of law. . . . It renders the defendant liable as an ordinary bailee for the actual value of the property lost."

IV

Turning once again to the Railroad's Petition for Certiorari, its "Statement of the Matter Involved," pp. 1, 2 and 3, and to Petitioner's Brief in this Court, "Statement of the Case," pp. 2, 3 and 4, the Petitioner has failed to call to the attention of this Court, through inadvertence no doubt, certain important findings of the trial court. The facts found by the trial court and not mentioned by the Railroad unquestionably were deemed of importance both by the trier and by the Connecticut Supreme Court. In the Record at p. 8 we find paragraphs 12, 13 and 14 of the Finding reading as follows:

> "12. There was no evidence offered that Plaintiffs or either of them paid or intended to pay anything of value for handling said baggage at New Haven on October 5, 1949.
>
> "13. Said Red-Cap gave the Plaintiff no ticket or any other evidence of a claim or claim check nor any other item with printing or any statement of limitation of liability upon it, and said Plaintiff had no knowledge of the tariff referred to in Paragraph 9.
>
> "14. There were no signs posted at any point calling the attention of the passenger to the fact that the Defendant attempted to limit its liability by the use of the tariff referred to."

The Supreme Court in its opinion, R. p. 15, said:

> ". . . There was no evidence offered that she paid or intended to pay anything of value for the handling of the baggage. The redcap did not issue any ticket or check. There were no signs posted at any point calling the attention of passengers to the fact that the defendant's liability was limited by any tariff schedule. The plaintiff had no knowledge of any tariff limiting liability. From these subordinate facts, the court concluded that the baggage was left with the defendant for safekeeping and not for transportation in interstate commerce, and that the defendant's liability was determined by the laws of Connecticut concerning bailment. The appeal tests the correctness of this conclusion."

On what theory the Railroad fails either to mention or to discuss the facts found, as above, is not apparent. Nor is it clear on what reasoning the Railroad submits the various speculations and conclusions outside of the Record, as above pointed out. An examination of the Railroad's Statement or Argument, or both, will disclose varying postures in which the Railroad would pose the circumstances, depending, it would seem, on what mental reaction it seeks to achieve at the particular time. In addition to the instances previously mentioned, while it is realized that the Railroad's Brief before the Supreme Court of Errors in Connecticut is not before this Court, in fairness to the lower court it is hoped we may refer to the Railroad's Brief, below, at p. 4 where the Railroad in its Argument said:

> "At New Haven she had to change trains and wait about an hour for the Fall River train. Obviously, to save bothering with the bag during that time, she gave it to the Red Cap and told him to return the bag to her at the train leaving for Fall River on Track #8. In the meantime she probably was going to have a bite to eat in the station. . ."

Again, at p. 9 of its Argument in its Brief to the court below, the Railroad urged:

> "The trial court's ruling in the instant case was that the bag of plaintiff was left with defendant for safe-keeping and not for transportation and therefore was not in interstate commerce. (F. par. 17, R. 9). Apparently the court's feeling was that the transaction was similar to that where the plaintiff after alighting from the Meriden train might have taken her bag to the railroad station parcel room and checked it there or else put it in an automatic coin locker. Had that been done the bag would have been left for safe-keeping."

Undoubtedly the Connecticut Supreme Court had such things in mind when it recited the facts before it as will appear in its Opinion, R. pp. 14, 15 and 16.

V

The Exhibits in the trial court were not printed, pursuant to order of court, R. pp. 10, 11. It is presumed they will have been transferred to this Honorable Court as part of the original file. The New England Joint Tariff, R. C. N-3 referred to in Finding, par. 9, R. p. 8, reads, in pertinent part;

1. "Carriers parties to this tariff do not undertake to furnish Red Cap service generally or at all stations on their lines, or at all times at stations where such service is furnished. When and where and to the extent that Red Cap service may be furnished by the carriers for handling the hand baggage and other personal effects of passengers, the carriers' charge for such service will be at the rate of Fifteen (15) Cents for each piece so handled . . .

2. "Carriers will not accept a greater liability than Twenty Five (25) Dollars per bag or parcel, or the actual value of the bag or parcel if said actual value is less than Twenty Five Dollars, for each bag or parcel handled by Red Caps under the provisions of this tariff, unless a greater value is declared in writing by

the passenger. If a greater value is so declared in writing by the passenger, an additional charge of Ten (10) Cents per bag or parcel will be made for each One Hundred (100) Dollars or fraction thereof above Twenty Five (25) Dollars so declared. Any bag or parcel which is declared by the passenger to have a value in excess of Five Hundred (500) Dollars will not be accepted for handling by Red Caps under the provision of this tariff. Bar or parcel as used in this tariff means a bag or parcel including its contents.".

Both the trial court in its Finding, par. 14, R. p. 8, and the Supreme Court of Errors in its Opinion, R. p. 15, point out that there were no signs posted at any point calling the attention of the passenger to the fact that the Railroad attempted to limit its liability by the use of the tariff referred to. Nor did the plaintiff have knowledge of the tariff referred to.

Title 49 U. S. C. Sec. 20, par. 11 provides that any railroad receiving property for transportation from a point in one state to a point in another state shall issue a receipt for such property and shall be liable to the lawful holder thereof for any loss to such property caused by such railroad to which such property may be delivered. It is further provided that no contract, receipt, rule, regulation or other limitation of any character shall exempt the railroad from the liability so imposed. Any such railroad receiving, or any such railroad delivering said property so received shall be liable to the lawful holder of a receipt whether such receipt has been issued or not for the full actual loss or damage to such property caused by such railroad when transported on a through bill of lading notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or in any tariff filed with the Interstate Commerce Commission.

The Finding, par. 13, R. p. 8 and the Supreme Court below, in its Opinion, R. p. 15, find as a fact that the plaintiff received no ticket or any other evidence of a claim or

claim check or any other item with printing or any statement of limitation of liability upon it.

Title 49 U. S. C. Sec. 20, par. 11 further provides:

> "That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains . . . carrying passengers . . ."

There is no basis whatever, as will be disclosed by a reading of the applicable section of the statutes, for the issuance of a "tariff" which can limit the liability of the Railroad to this passenger as to baggage not "carried on passenger trains." There is no duty upon the passenger to declare the value of baggage unless she comes within an applicable statute or a regulation lawfully issued thereunder. There was no baggage check issued. The Red Cap delivered no claim check, he collected no fee. Mrs. Nothnagle's baggage was not, at the time of its loss, in a coach. For a substantial period of time, approximately an hour and ten minutes, the Railroad's employee accepted custody of the baggage. The passenger was under no duty which could devolve upon her by virtue of a lawful and applicable tariff which, the Railroad argues, would bind the passenger on the ground that her ticket for transportation had originally called for an interstate trip. Rather, so far as is disclosed by the record before us, her trip ended at New Haven and at the time of the loss of her baggage, it was purely intrastate.

As has been demonstrated above, the plaintiff was not on a train when her baggage was lost, nor was the baggage lost while being "carried" on a passenger train. On the contrary, the trial court found, Finding, par. 17, R. p. 9, and the court below in its Opinion, R. pp. 15-16, sustained that finding, that the baggage was left with the defendant for safekeeping and not for transportation in interstate

commerce—nor was it accepted even to be carried on to a train. On the contrary, the trial court found, Finding, par. 5, R. p. 7, that the plaintiff below had surrendered her baggage to the Red Cap with directions to have the baggage returned *to her* at the train due to leave for Fall River on Track #8 at 12:40 P.M.

VI

It is respectfully submitted that the writ should be dismissed. There is an adequate nonfederal ground to support the state court judgment. To the extent that it may be urged that there is a federal question present, the federal question was correctly decided *on the facts in this case.*

The situation here presented is completely different from *Galveston H. & S. A. Ry. Co.* v. *Woodbury,* (1920) 254 U. S. 357, 41 S. Ct. 114, and similar cases applicable where a passenger has checked his baggage from one point to another. Nor is it like *Kirchoff* v. *Southern Pacific Co.* (D. C. Cal. 1946) 68 F. Supp. 877, where the Red Cap issued a claim or baggage check reciting the limitations authorized by the Civil Code of California, cited therein. Here the passenger received no check. Here there is no finding that the passenger boarded a train. Here there was no fact or circumstance to put the passenger upon notice that a claimed limitation of liability existed.

The writ should be dismissed. *Fox Film Corp.* v. *Muller,* (1935) 296 U. S. 207, 56 S. Ct. 183; *Berea College* v. *Kentucky,* (1908) 211 U. S. 45, 29 S. Ct. 33; *Herb* v. *Pitcairn,* (1945) 324 U. S. 117, 125, 65 S. Ct. 463.

Respectfully submitted,

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